

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:**

**JAMES MOY AND AMBOR PRIMM d/b/a**

**A MUM’S TOUCH DAY CARE**

Ambor Primm

Mark North

For the Application

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OZAH Case No. CU 16-03

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Before: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER’S REPORT AND DECISION**

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## **I. STATEMENT OF THE CASE**

On July 22, 2015, the Applicants, James Moy and Ambor Primm, d/b/a A Mum's Touch Child Care, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children in her home at 14227 Woodcrest Drive, Rockville, Maryland. The subject property is further described as Lot 1, Block 1 of the Manor Woods Subdivision, and zoned R-90. The R-90 Zone requires approval of a conditional use to operate a group day care for up to 12 children. *Montgomery County Zoning Ordinance*, §59.3.1.6.

The Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on November 16, 2015. Exhibit 22. Staff of the Montgomery County Planning Department (Staff or Technical Staff) issued its report recommending approval of the application subject to eight conditions. Exhibit 27. The Planning Board also recommended approval, adopting the conditions recommended by Staff, but recommended that "if the Hearing Examiner determines that this Site qualifies for alternative compliance under Division 6.8, Staff should work with the Applicant and the Hearing Examiner to develop an adequate landscaping plan that will provide appropriate screening without creating undue burden for the applicant to meet the strict screening requirements of Section 6.5.3.C.7." Exhibit 28.

In response to the Planning Board's recommendation, the Hearing Examiner requested the Applicant to provide a Landscape Plan. She also requested Staff to comment on whether the Applicant's plan met the requirements for alternative compliance with the screening requirements. These were timely provided (Exhibits 34-36), and the hearing proceeded as scheduled on November 16, 2015.

At the public hearing, Ms. Primm testified on behalf of the Applicant that she did not agree with several of the conditions recommended for approval and that they did not reflect what

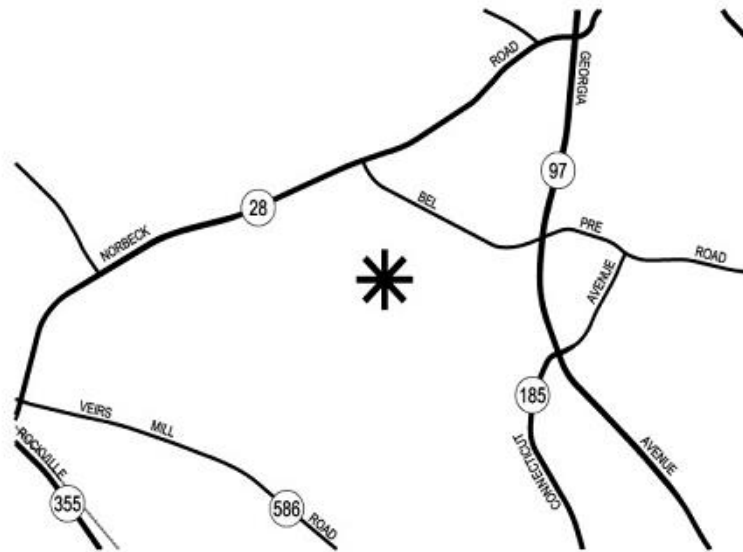
she had proposed for the group day care. T. 29-48. Specifically, she disagreed with a condition limiting the day care to two full-time non-resident employees because she needs a third part-time employee to meet State staffing requirements when she must leave the day care. She also disagreed with a condition prohibiting the first non-residential employee from arriving before 8:30 a.m. and asked that it be changed to 7:30 a.m. She also requested that children up to 12 years of age be permitted to attend the day care because she plans to include her own children and their friends in the program until they are 12 years of age. T. 38. Perhaps the area of most disagreement are with Staff's recommended limitations on outdoor play time. Staff limited outdoor play to a maximum of 8 children beginning after 9:00 a.m.

The Hearing Examiner left the record open until November 30, 2015, in order to have Staff review Ms. Primm's requested changes and to permit Ms. Primm an opportunity to submit her parent parking policy into the record and comment on the requested comments from Staff. T. 54; Exhibit 38. Staff filed an initial response on November 16, 2015, and Ms. Primm submitted the parent parking policy on November 17, 2015 (Exhibit 39). After questions from the Hearing Examiner, Staff filed its final response on November 30, 2015, the date the record was to close. To provide the Applicant with a chance to respond to Staff's comments, the Hearing Examiner re-opened the record on December 1, 2015, until December 3, 2015. Ms. Primm submitted her responses on December 3, 2015, and the record closed on that date.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The subject property consists of .22 acres (9,583.2 square feet), zoned R-90, and is located west of Route 97 (Georgia Avenue) and south of Bel Pre and Norbeck Roads. A vicinity map from the Technical Staff Report (Exhibit 27, on the next page) shows the general location.



The property is a corner lot with frontage on both Bauer Drive and Woodcrest Drive. It is improved with a single-family split-level detached home. Driveway access is from Woodcrest Drive and a speed bump is located to the northwest of the property on Bauer Drive. An aerial photograph from the Technical Staff Report (Exhibit 37, p. 3) depicts existing conditions:





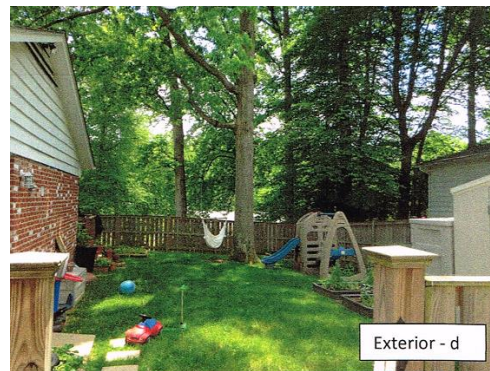
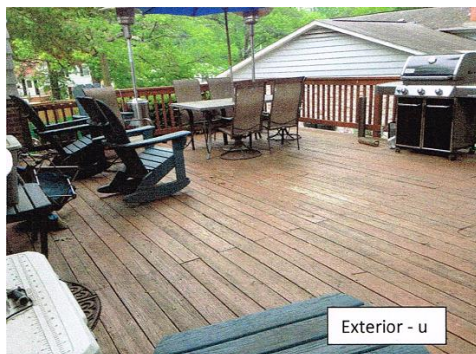
The front and rear of the home and the driveway are depicted below in photographs submitted by the Applicant (from Exhibit 15(a), shown below and on the next page):







The rear and side yards are shown in the following photographs (Exhibit 17):

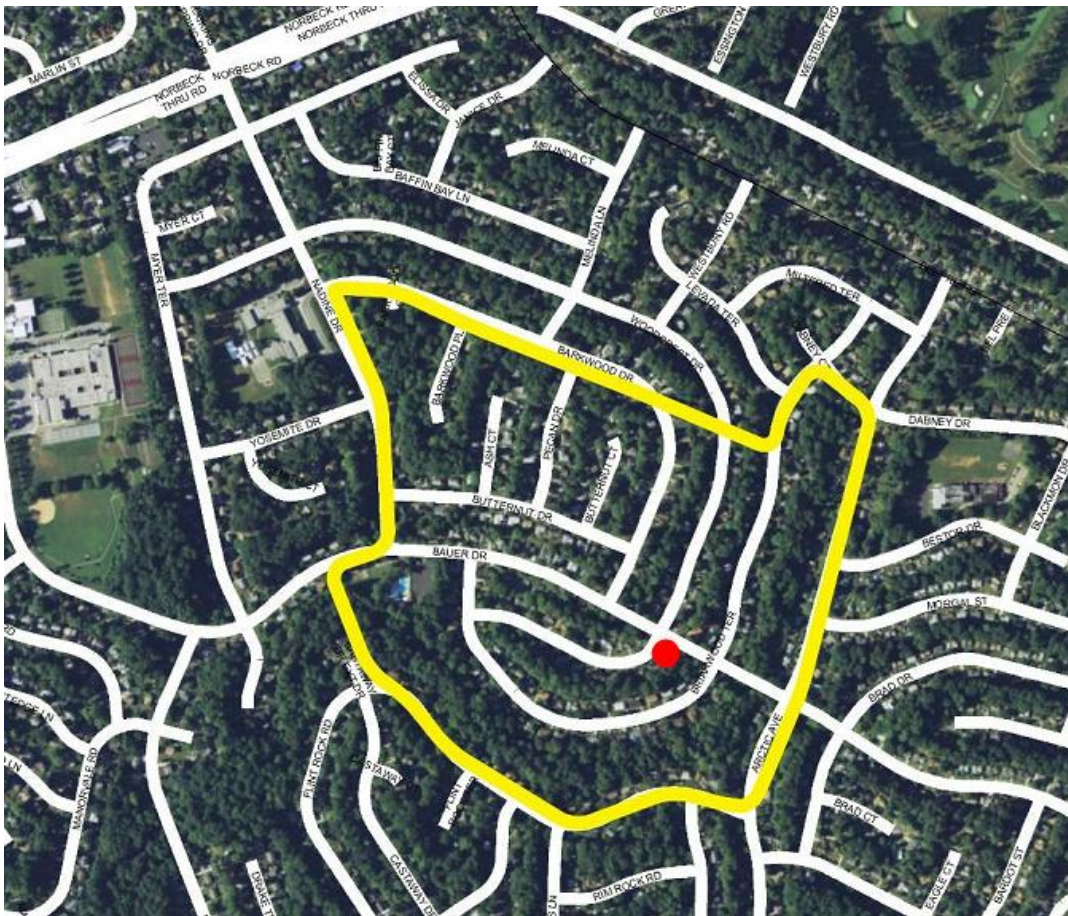




Two single-family detached homes abut the properties eastern and western boundaries, one fronting on Woodcrest Drive and one fronting on Bauer Drive.

### **B. The Surrounding Area**

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding area” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “Barkwood Drive and Dabney Drive to the north, Nadine Drive to the west, Flint Rock Road to the south, and Arctic Avenue to the east.” Staff advises that the area consists of primarily single-family detached homes and there are no existing conditional uses within the neighborhood. Staff included an outline of the surrounding area boundaries in its Staff Report (Exhibit 37, p. 4):



Having no evidence to the contrary, the Hearing Examiner accepts Staff's definition of the neighborhood boundaries as reasonably reflecting the area most likely to be impacted by traffic, parking, noise, and other aspects of the use. She agrees that the neighborhood is properly characterized as consisting of single-family detached homes.

### **C. Proposed Use**

The Applicant currently operates a Family Day Care facility (for up to 8 children) in the basement, living room, and rear yard of her home. The existing day care has children ranging in age from infants to five years of age. Ms. Primm originally submitted a statement (Exhibit 15) that she wished to have children only up to pre-school age, but at the hearing, testified that she wishes to expand that age range up to 12 years of age. She wanted the flexibility of having children up to 12 years of age to accommodate her own children plus some friends, which is permitted by her licensing. T. 38. She did not foresee that all children would be 12 years old, and there would still be a mix of ages. T. 39-40. When apprised of the different proposal, Staff recommended ages the children above five years of age be limited to Ms. Primm's own children. Exhibit 41. Ms. Primm disagrees with several of the conditions recommended by Staff.

Ms. Primm testified that her program is Montessori inspired, although they are not licensed as a Montessori school. T. 46. Her approach is very organic—she believes the children should be outside playing in the dirt, walking, and going to the park. Once the children are toilet trained, she takes them on field trips frequently. She believes that the daycare should be an extension of families and have a family environment. She wants to keep the daycare to 12 children so she can still be in constant contact with the families, similar to a co-op situation. Ms. Primm believes that she is in high demand because of this philosophy. They have a waiting list and daycare is a huge need. Her goals is to provide structure, to have them kindergarten-ready,



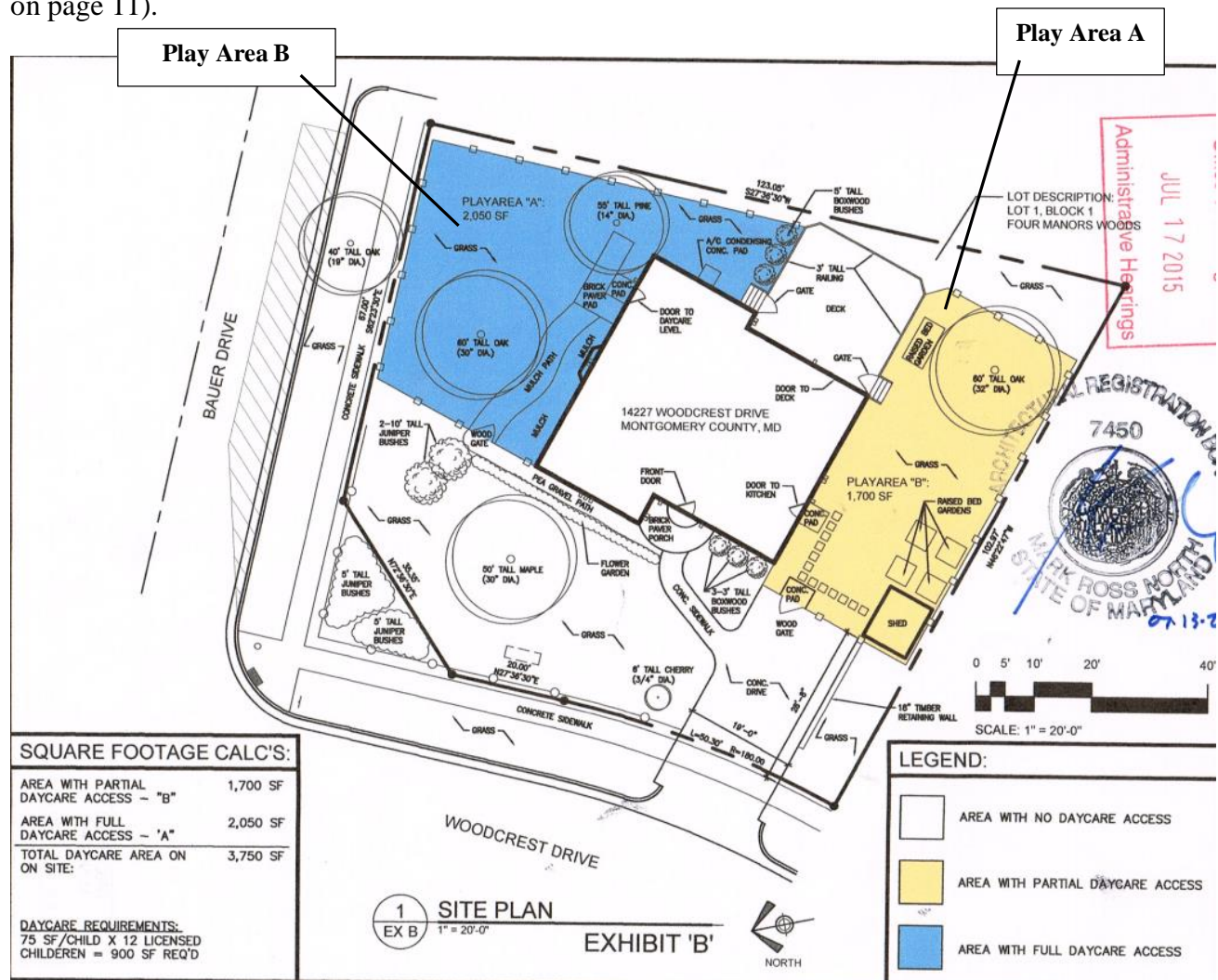
but also to provide as many outdoor activities as possible because she feels that is missing in most daycares. For this reason, her program includes a lot of gardening to help the children learn where food comes from. T. 46-48.

Staff recommended approval of the application subject to 8 conditions. Several of these conditions were based on information submitted by Ms. Primm concerning the proposed operations. Exhibit 15. At the public hearing, Ms. Primm disagreed with many of Staff's original recommended conditions in this case. Because of their importance to this case, the Hearing Examiner sets them forth here (Exhibit 27, p. 2):

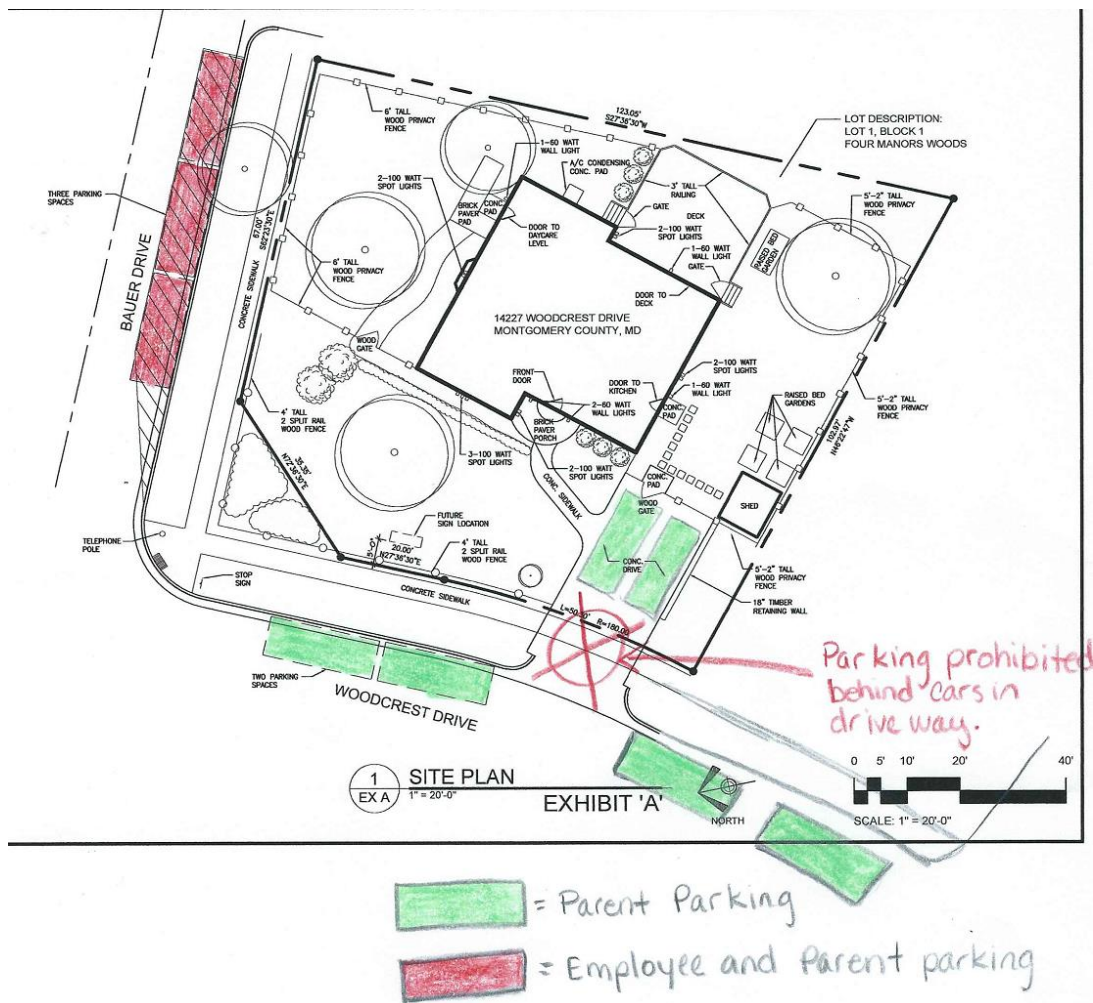
1. The day care use is limited to 12 children (up to five years old) and 2 non-resident full time employees, not including the owner/operator who is a resident.
2. The hours of operation must be limited to 7:30 a.m. until 5:30 p.m., with the first non-resident employee arriving at 8:30 a.m., and the last employee leaving no later than 5:30 p.m., Monday through Friday. No weekend or overnight day care is permitted.
3. The Applicant must schedule staggered drop-off and pick-up of no more than two vehicles every 15 minutes to distribute the vehicular trips to/from the site for safe on-site and on-street circulation.
4. The Applicant must provide parental agreements to the Hearing Examiner, indicating that drop-off and pick-up times of all children attending the day care will be limited to no more than two vehicles at any one time.
5. Employees for the child day care facility must park off-site on nearby streets where on-street parking is allowed.
6. Outdoor play times must be staggered and may not start prior to 9:00 a.m.
7. No more than eight children are permitted to play outside at any one time.
8. The Applicant must provide an eight-foot wide landscape screen using native planting materials along the east and south lot lines shared with abutting houses to meet the requirements of Sections 59-6.5.3.A and 59-6.5.3.C.7.

## 1. Site Plan, Access, On-Site Parking and Areas for Drop-off and Pickup of Children

The final site plan, reproduced below (Exhibit 6), shows the details of the proposed use. Exterior areas used for the day care are marked as "Play Area A" and "Play Area B." In response to Staff's recommended condition No. 4 (above) requiring submittal of parental agreements with specific drop-off and pick-up times, Ms. Primm also submitted a site plan showing permitted locations for drop-off, pick-up, and employee parking (Exhibit 39(b), shown on page 11).



The Applicant's expert architect, Mr. Mark North, testified that the day care will have ample parking for pick-up and drop off. On-street parking is permitted along both Woodcrest and Bauer Drives and there are two spots in the driveway. T. 31. Currently, all but one of the families walk to the day care. T. 49. The site plan showing where parking for parents and employees will be permitted is shown below (Exhibit 39(b)):



Ms. Primm's proposed parent parking policy states (Exhibit 39):

### ARRIVAL AND DEPARTURE

*Arrival and departure is a very important time of the day for you and your child. Please refrain from talking on your cell phone when entering the child care center.*



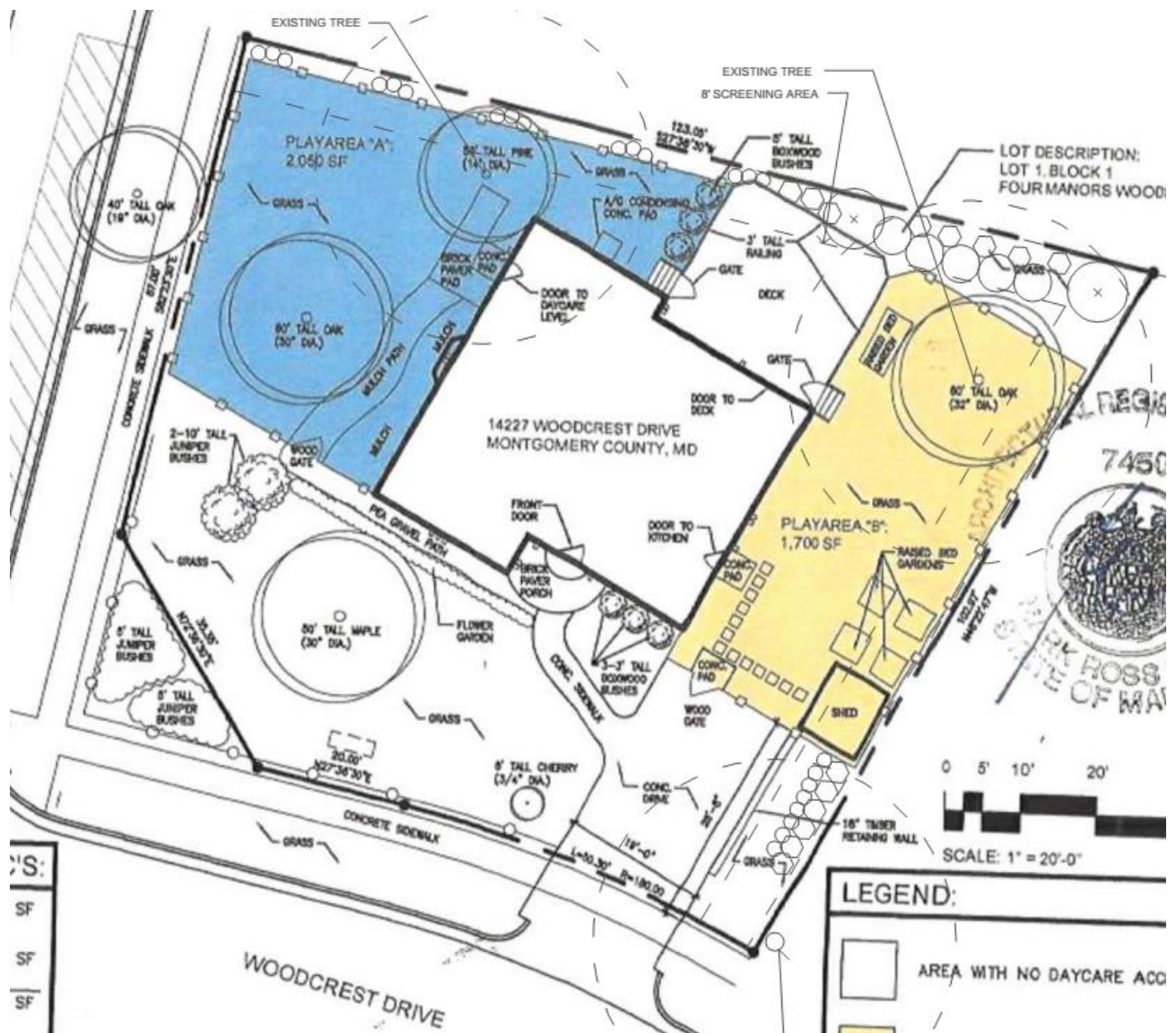
1. Children must arrive at the time negotiated on the contract unless prior arrangements have been made. There is an exception on days when a child has a doctor's appointment, however communication must be noted in advance if the child will be dropped off or picked up outside the agreed upon time in contract [sic].
2. Parking is limited and parents must adhere to parking regulations per the county zoning regulations. Please see the designated parking spaces allowed for parent's loading and unloading map below. A fine of \$10 will be charted for repeated car parking in prohibited spaces. Please communicate parking regulations to additional family or friends who will be picking up or dropping off your child.

In its initial Report (that assumed two non-resident employees), Staff concluded that there was sufficient parking for employees and parent drop-off and pick up. The Zoning Ordinance requires one parking space for each non-resident employee in addition to two spaces for the occupants of the dwelling. Spaces located on the street where parking is permitted may be counted toward this requirement. Staff concluded that the two spaces in the driveway accommodated the residential parking requirement and there were sufficient spaces located on Woodcrest Drive and Bauer Drive for the employees. Exhibit 27, pp. 13-14. When apprised of the proposal for an additional part-time staff person, Staff concluded that a sufficient number of on-street spaces remained because there is room for five on-street parking spaces on Woodcrest and Bauer Drives. Exhibit 41.

## **2. Site Landscaping, Lighting and Signage**








Currently, landscaping on the property does not meet the screening requirements of the Zoning Ordinance, which call for an 8- to 12-foot wide planting buffer along the property lines adjacent to the two single-family detached homes. *Zoning Ordinance*, §6.5.3. The Planning Board recommended that the Hearing Examiner and Staff work with the Applicant to determine whether the existing wooden privacy fence and landscaping could serve as an alternative means

of complying with the Zoning Ordinance. Ms. Primm testified that she did not wish to install the required landscaping, particularly along the edge of Play Area A because it would interfere with the garden she uses for learning activities. T. 8. The Applicant submitted a revised landscape plan (Exhibit 34(a) shown on the next page), which Staff advised meets the requirements of Section 6.8.1 of the Zoning Ordinance (setting forth standards for approving alternative means of compliance with screening requirements):



Landscape Plan  
Exhibit 34(a)

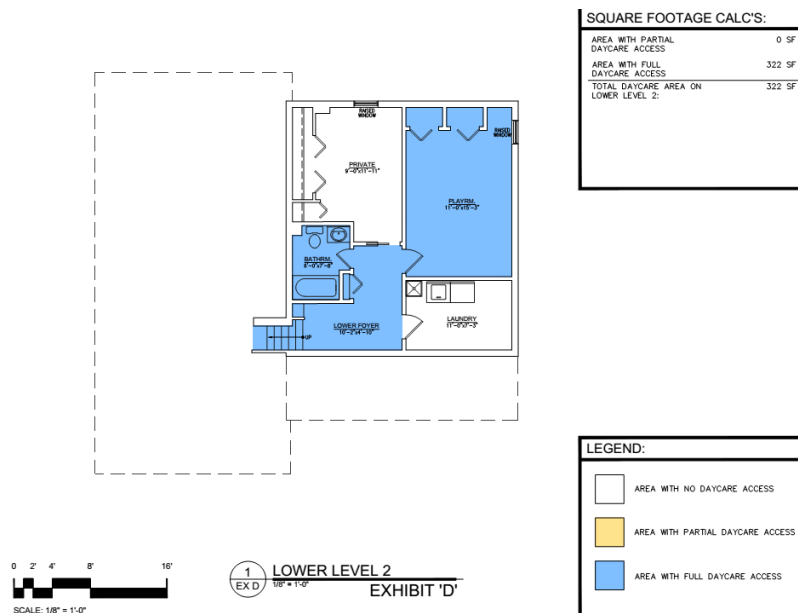
This plan proposes new landscaping of native species, including understory trees and a variety of shrubs, along the eastern lot line that will supplement existing canopy trees on the property. The plant listing from the landscape plan is shown below (Exhibit 34(a)):

PLANT LIST   EAST LOT LINE	
	Canopy Tree: Utilizing existing mature trees (2 existing tree on site) Red Maple (or approved equal)
	Understory Tree: Flowering Dogwood (or approved equal) Partial shade to shade requirement
	Large Shrub: Minimum Required (6 min. including existing boxwood) Maple Leaf Viburnum (or approved equal) Shade to partial light
	Medium Shrub: Minimum Required (8 min.) Dwarf English Boxwood (or approved equal)
	Small Shrub: Min. Required (8 min.) Evergreen Liriope (or approved equal) Shade and light tolerant
PLANT LIST   SOUTH LOT LINE	
	Medium Shrub: Minimum Required (6 min.) Dwarf English Boxwood (or approved equal)
	Small Shrub: Min. Required (8 min.) Evergreen Liriope (or approved equal) Shade and light tolerant

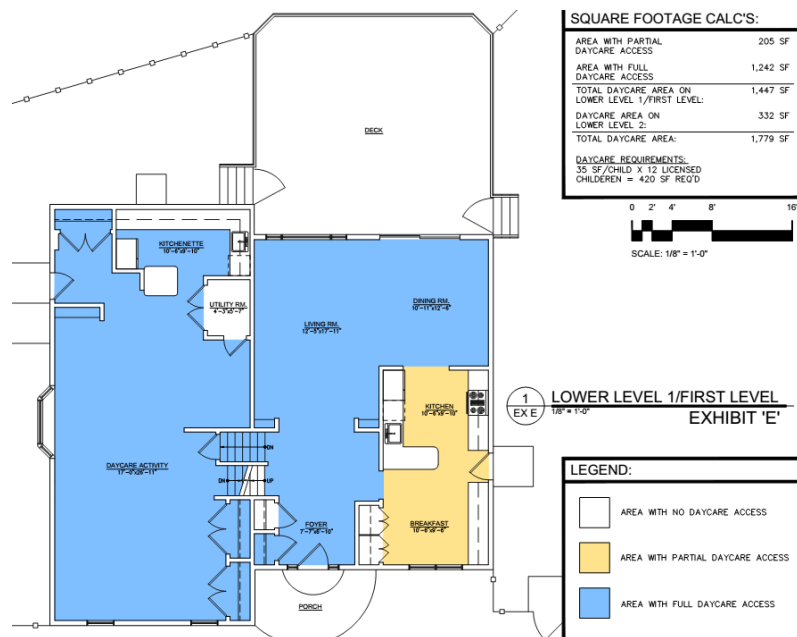
Staff advises that there are two signs advertising the daycare. Each of the signs is two square feet or less. Exhibit 27, p. 16.

### 3. Internal Physical Arrangements for Site Operations

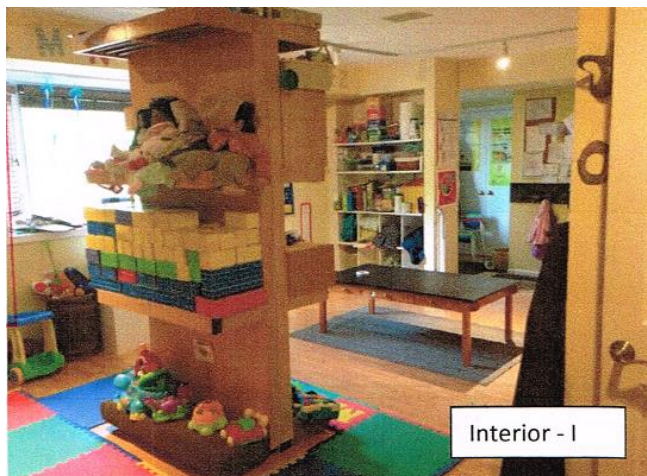
The proposed internal physical characteristics of the facility are shown on floor plans submitted by the Applicant (Exhibit 10, shown below and on page 15):







The existing child care area is depicted in photographs supplied by the Applicant, two of which are reproduced below (from Exhibit 15(b)):



#### 4. Operations

In its original report, Technical Staff summarized the Applicant's proposed operations as follows (Exhibit 27, p. 5):

The Applicant is requesting a conditional use for converting the current family day care with up to eight children into a Group Day Care of up to 12 children ranging from three months to five years of age. The day care facility will be located in the lower and main levels of the existing single-family detached home owned by the Applicant. The day care facility currently has one full-time employee and one part-time employee in addition to the business owner residing in the house. The proposed Group Day Care will employ two full-time employees in addition to the resident-owner. The hours of operation are Monday through Friday, 7:30 a.m. to 5:30 p.m.

The proposed Group Day Care's schedule for drop-offs and pickups will be staggered between the hours of 7:30 a.m. and 5:30 p.m., Monday through Friday. The drop-off and pick-up will be limited to two vehicles in 15-minute intervals to distribute the vehicular trips to/from the site. The two full-time staff members will arrive at 8:30 a.m. One full-time employee will leave at 4:30 p.m. and the second will leave at 5:30 p.m.

Staff's summary is based on a statement submitted by Ms. Primm, which specifically proposed a total of four infants, four toddlers, and four preschool children. Exhibit 15, p. 5. At the public hearing, Ms. Primm testified that she proposed to have two full-time non-resident employees and one additional part-time non-resident employee to maintain staffing levels when she was absent. She also testified that the first non-resident employee would arrive at 7:30 a.m. rather than 8:30 a.m. as stated in Staff's recommended condition. Finally, she stated that she proposes to have children up to 12 years of age in the daycare to accommodate her own family and some of their friends as they grow older, which is permitted by her licensing. T. 38. As noted, Ms. Primm did not foresee that all children would be 12 years old, and there would still be a mix of ages. T. 39-40. Ms. Primm's "OZAH Amended Checklist for Conditional Use—Responses & Additional Supporting Information – Exhibit #1" did not explain her intent to open the daycare to 12 year olds. Exhibit 15, p. 5.

Most of Ms. Primm's disagreement with Staff relates to outdoor play. Staff initially recommended that (1) no more than eight children be outside at any one time, (2) that playtimes start after 9:00 a.m., and (3) that outdoor play times be staggered. Ms. Primm testified that her

program currently does not have specified outdoor play times and they do many learning activities in the yard. At the public hearing, she asked for the flexibility to have all 12 children out for 20 minutes in any given time of the day to allow them to do projects together, particular in the summer months. T. 33, 35, 44. She would like outdoor playtimes to begin as early as 8:00 a.m. in summer months. T. 44. They would like to be able to have all 12 children outdoors for 20-minute periods in the late afternoon after 2:00 p.m. T. 45. Later, she requested to have no restrictions on outdoor play times after nap time ends at 2:00 p.m. Exhibit 44(a).

The Hearing Examiner referred these requests to Staff for its recommendations. The Hearing Examiner outlines Staff's recommendations and the Applicant's responses below:

1. Additional part-time employee: As already discussed, Staff concluded that there was sufficient parking for an additional part-time employee.
2. Age of Children: Staff advised that the age of the children could be raised to 12-years, but only to accommodate the Applicant's own children. Staff stated that, "[I]f too many 12-year old children are concentrated in the home and/or outside it may affect the use and peaceful enjoyment of the neighboring properties." Ex. 44(a).

The Applicant recognized that noise levels for 12 children that are 12 years old could be louder than younger children, but asserts that she doesn't anticipate that all 12 children enrolled would be 12 years of age. Specifically, she asks to "maintain the flexibility afforded by State Licensing to allow a mixed age group so that the Applicant's children will be allowed to continue to remain in our care as they grow up. Limitations on the allowable age group would directly affect the families (including the Applicant's own family) who would like to keep their siblings, friends and participating Program children together as they grow up." *Id.*



3. Arrival Time of First Non-Resident Employee: Both Staff and the Applicant agree that moving the arrival time of the first non-resident employee from 8:30 a.m. to 7:30 a.m. will not negatively impact the neighborhood.

4. Time for Commencing Outdoor Play:

Staff recommended that outdoor playtime begin no earlier than 8:30 a.m. because it was “concerned noise may be a problem with neighbors waking/preparing for work before 8:30 a.m.” *Id.*

The Applicant calls the Staff’s opinion “subjective” and states that this limitation was never discussed during meetings with Staff. She states that the program “has and will continue to promote the maximum ability for its children to experience the benefits of outdoor structured activities” and that it will continue to abide by the requirements of the Montgomery County Noise Ordinance. *Id.*

5. Maximum Number of Children Outside:

Staff recommended against increasing the number of children permitted outside at any one time because it “believes noise levels resulting from infant and toddler play provides a different amount of noise level when compared to children between 6 and 12-years of age. Staff opined that “twelve children of various age groups outside may have a significant impact on the noise level and peaceful enjoyment of neighboring properties.” *Id.*

The Applicant requests that there be no restrictions on the number of children outside at any one time for several reasons. First, Ms. Primm argues that the program currently has five children ranging up to five years of age. She states that children over the age of five years will be participating in off-site school activities daily for a majority of the year, except for the summer months and that her program will provide additional alternatives to outside play yard

activities. She also asserts that outdoor play on the subject property will be quieter because it is not “free play,” which is only permitted on walks and at a neighboring park. She wishes to give children in the program the opportunity to explore the world through some activities that are best done outside. She pledges to “ensure that any screaming, running or other disruptive noise will be minimized” and “reserved for off-site activities such as semi-daily walks to the local park.”

*Id.* She maintains that the primary use of the outdoor play areas on the subject property will be to provide learning activities such as a “picnic on a blanket for lunch, a gardening activity, a science experiment, or other outdoor activities normal for children within the ages served by the Program.” Finally, Ms. Primm argues that the extra landscaping screening required for adding four children to the program is not justified given the restrictions on outdoor play time.

#### **D. Community Response**

There are several letters of support from parents of children enrolled in the current family day care. Exhibit 18. Their support is based on the quality of the day care currently provided and the difficulty of obtaining this quality of care in the vicinity. *Id.* The Applicant mentions several times a letter from adjacent neighbors expressing concern about the potential for increased traffic and problems parking, although the letter is not in the record. *See, e.g.* Exhibit 44(a).

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a child day care center for up to 12 children. *Zoning Ordinance* §59.3.4.4.D.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

**A. Necessary Findings (Section 59.7.3.1.E.)**

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:<sup>1</sup>

***E. Necessary Findings***

***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:***

***a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

Conclusion: Technical Staff advises that there are no previous land use approvals applicable to the property. Exhibit 35, p. 9. The R-90 Zone permits the existing 8-child facility by right. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and applicable general requirements under Article 59-6;***

Conclusion: This subsection requires an analysis of the standards of the R-90 Zone contained in Article 59-4; the use standards for a Group Day Care for up to 12 persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III. B, C, and D,

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<sup>1</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6, with the conditions of approval set forth in Part IV of this Report and Decision.

***c. substantially conforms with the recommendations of the applicable master plan;***

Conclusion: The subject property lies within the geographic area covered by the *1994 Aspen Hill Master Plan* (Master Plan or Plan.) Technical Staff reports that the Master Plan does not specifically discuss the subject site, but does provide guidance about conditional uses (formerly special exceptions). The Plan's major objectives are to maintain and protect the character of existing residential neighborhoods. *Plan*, p. 21. With regard to conditional uses, the Plan seeks to protect residential neighborhoods from incompatible uses, and states (*Plan*, p. 81):

- Any modification or addition to an existing building to accommodate a special exception use should be compatible with the architecture of the adjoining neighborhood and should not be significantly larger than nearby structures.
- Front yard parking should be avoided because of its commercial appearance; however, in situations where side or rear parking is not available, front yard parking should be allowed only if it can be adequately landscaped and screened.
- Close scrutiny should be given to replacing or enhancing the screening and buffering as viewed from abutting residential areas and along major roadways.

In addition to the guidelines for conditional uses, the Master Plan also encourages the provision of child day care facilities, recommending that these facilities “should be encouraged to meet the needs of the residents of Aspen Hill,” and reiterating that the Plan “supports various types of child day care facilities within the planning area, particularly those providing care to the youngest children.” *Plan*, p. 193. The Plan states the following design guidelines for child care facilities (*Plan*, pp. 192-193):

- Sufficient open space to provide adequate access to sunlight and suitable play areas, taking into consideration the size of the facility.



- Location and design to protect children from excessive exposure to noise, air pollutants and other environmental factors potentially injurious to health or welfare.
- Location and design to ensure safe and convenient access. This includes appropriate parking areas and safe and effective on-site circulation of automobiles and pedestrians.
- Location and design to avoid creating undesirable traffic, noise and other impacts upon the surrounding community.

Staff concluded that the proposed application is consistent with the Master Plan (Exhibit 27, p. 16):

The Applicant's proposal to expand the existing day care to a maximum of 12 children addresses a need identified in the Plan. No physical alterations are proposed for the Site or the house. An existing fence around the perimeter of the back and side yards provides a buffer from the adjacent residences. No new front yard parking will be installed. The proposed use is required to provide adequate landscaping and screening per the screening requirements of the zone. The proposed facilities will retain the existing residential character of the neighborhood.

Conclusion: The Hearing Examiner concludes that the use, with conditions set forth in Part IV of this Report and Decision, complies with the Master Plan. For the reason set forth in the next section, these conditions limit the age of the children to no more than five years, limit the number of children that may be outside at one time to 8 (except for structured learning activities as described below), and limit commencement of outdoor play time to 8:30 a.m. With these limitations, the day care will meet both the need described in the Plan and fulfill the Master Plan's guidance that facilities should avoid undesirable noise and other activities in the surrounding area.

***d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;***

Conclusion: In its original report, Technical Staff found that the proposed use meets this standard because no alterations are proposed to the existing home. Exhibit 27, p. 16.

Nevertheless, the character of the neighborhood may be altered by factors other than simply the physical improvements to the subject property, such as traffic and noise. As noted above, the Master Plan also recommends that the “location and design” of child care facilities should protect the neighborhood from “undesirable traffic, *noise* and other impacts upon the surrounding community.” *Plan*, p. 193 (emphasis supplied.)

Staff’s limitations on (1) the time for commencement of outdoor play, (2) the number of children permitted outside at any one time, and (3) the ages of the children served all stem from a desire to protect the neighborhood from excessive noise. Exhibit 41. The Applicant recognizes that multiple 12-year olds may increase noise levels, but asserts not all 12 of the children will be 12 years old and that she will not exceed the noise standards in the County Code. Exhibit 44(a).

While Ms. Primm calls Staff’s recommendations “subjective,” the burden of proving that standards of the Zoning ordinance are met rests with the Applicant. It is more typical than not to have significant limitations on outdoor play, either through a condition of approval or as proposed in the Applicant’s Statement of Operations. *See, e.g.*, SE 14-03, Application of Lasado (outdoor play commences at 9:00 a.m. and limited to a maximum of 8 children), SE 14-01, Application of Soraia and George Leventhal (outdoor play commences at 8:30 a.m. limited to a maximum of 8 children), SE 12-04, Application of Maria Sideris (outdoor playtime limited to one hour in the morning beginning at 10:00 a.m. and from 4:30 p.m. to closing), SE 12-03, Application of Mariana Ilie (outdoor play limited to once or twice a day.)

*1. Age of Children:* The Hearing Examiner finds that the Applicant has failed to meet her burden to prove that an unspecified number of children above age 5 will not impact properties in the surrounding area. The Applicant has provided no specifics on how many children would be in the higher age ranges, what the exact schedule would be in the summer months, and what

measures could be taken to ensure that noise does not adversely affect the neighborhood. Simply asserting that the County Code requirements will be met is not sufficient for approval without any other evidence of why the use will not exceed the sound levels. The Hearing Examiner is also unclear as to the specifics of what the Applicant requests. If Ms. Primm's desire is to keep existing families together, as she states, then a majority of the children could be in the older age range at a single time. Nor is Ms. Primm specific as to how much of the on-site outdoor play will be "free play" or structured learning activities.

Ms. Primm's initial operational description would limit this use to children up to the age of five. Exhibit 15. Staff's concerns are warranted, particularly given the small size of the lot and the proximity of surrounding neighbors. Without more specific information as to why an unlimited number of older children would not impact the neighborhood, the Hearing Examiner agrees with Staff that the number of children up to 12 years old be limited to the Applicant's own children.

2. *Commencement of Outdoor Play Time.* The Hearing Examiner also agrees with Staff that outdoor play must not commence before 8:30 a.m. for the stated staff. This is a typical condition in applications for group day care facilities of this type considering the size of the lot, the number of children, and the distance from neighboring dwellings. The Hearing Examiner understands Ms. Primm's desire to have an organic program, but this must be accomplished within the constraints of the requirements of the Zoning Ordinance.

3. *Number of Children Permitted Outside at One Time.* As to the number of children outside at any time, the Hearing Examiner agrees with Ms. Primm that a distinction may be made between free play and supervised instructional activities, such as science experiments, gardening, etc. At the public hearing, Ms. Primm testified that she would need 20 minutes outside with all 12

children at a time for these activities. She later stated that she would like all children to be outside after 2:00 p.m.

The Hearing Examiner finds that it is reasonable to conclude that noise levels during structured learning activities will be lower than those when children are outdoors for free play, but disagrees that all children be outdoors for the periods requested by Ms. Primm. Ms. Primm did not provide any information on exactly how many of these structured learning activities are part of the program, except to state that she wished no restrictions on the number of children outdoors after nap time (i.e., 2:00 p.m.). The Hearing Examiner disagrees that there should be no restrictions after 2:00 p.m. because of the concerns noted by Staff. Given the limitation restriction on the ages of the children to five years old, the Hearing Examiner finds that all 12 children may be permitted outdoors at the same time for structured learning activities 20 minutes in length, supervised by Staff, twice in the morning (after 8:30 a.m.) and twice after 2:00 p.m. At all other times, the maximum number of children that may be outside at one time is limited to eight.

As noted, Ms. Primm may apply to modify her conditional use in the future. If so, she must provide specific information on the ages of the children she proposes to serve, how outdoor play times will be structured, more information on the distinction between “free play” and “structured learning activities,” and how potential noise will be mitigated. It is difficult for the Hearing Examiner to find that all time after 2:00 p.m. will be in structured learning activities.

With the conditions described above, the Hearing Examiner finds that the use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a single-family, detached residence in a neighborhood of single-family, detached residences, and no external modifications to the structure or the lighting are planned. In



accordance with the recommendations of the Master Plan, activities will be structured to mitigate disturbance from noise on surrounding properties.

*e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;*

Conclusion: Staff confirmed that there are no other approved conditional uses in the Staff-defined neighborhood. Exhibit 27, p. 17. Thus, the Hearing Examiner finds that this standard has been met.

*f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:*

*i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*

*ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and*

Conclusion: The application does not require approval of a preliminary plan of subdivision. Exhibit 27, p. 17. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. Technical Staff advised

that the site is currently served by public services and facilities and it would “not adversely impact the weekday peak-hour trips.” *Id.* Transportation staff concluded that roadways would be safe if the Applicant staggers scheduled drop-off and pick-up to no more than two children every 15 minutes. *Id.*, Attachment 3. Ms. Primm has submitted the Parent Policy including this requirement, instructions on parking, and instructions on how to handle situations where parents must deviate from their scheduled times of arrival. By its nature, the proposed use, within an existing single-family residence, will not create additional burdens for schools, police and fire protection, water, sanitary sewer and storm drainage. Thus, the single area of increased demand on public facilities will be on transportation services. Technical Staff analyzed that impact in accordance with Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), as set forth in Attachment 3 of the Staff Report. With regard to LATR, Staff stated (Exhibit 27, Attachment 3):

Without the current and proposed scheduled staggered child drop-off/pick-up times [sic], the existing day care center serving up to 12 children and having 3 staff persons generates up to 14 peak-hour trips during the morning peak period (6:30 to 9:30 a.m.) and up to 14 peak-hour trips during the evening peak-period (4:00 to 7:00 p.m.) A traffic study was not required to satisfy the Local Area Transportation Review (LATR) test because the proposed child day care center expansion generates fewer than 30 total peak hour trips within the weekday morning and evening.

The additional part-time employee (even assuming he or she arrives and departs during the peak hour) would add only one peak hour trip to Staff's initial analysis, leaving the total well under 30 trips.

As to Transportation Policy Area Review, Technical Staff found that “a TPAR payment of the transportation impact tax will not be required because the square footage of the existing single-family residential unit will not be expanded to accommodate the increase in the number of children in the child care center.” Exhibit 27, Attachment 3, p. 3 (emphasis in original.)

In sum, both LATR and TAPR are satisfied in this case, and the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities.

*g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:*

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As specified in §59.7.3.1.E.1.g, quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a group day care. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not

consistent with the characteristics identified *or* adverse effects created by unusual site conditions will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a child day care facility: (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting.

In its original report, Staff found that there were no non-inherent impacts of a group day care for 12 children up to five years old that met all screening requirements, imposed more stringent conditions on outdoor play and failed to include the part-time employee. Exhibit 27, p. 17. Since then, however, the Applicant proposed several operational characteristics beyond those considered by Staff, including alternative compliance with the screening requirements, older ages of the children, more lenient restrictions on outdoor play times, an increase in the maximum number of children permitted during outdoor play times, and the additional employee. The Hearing Examiner concludes that the operational characteristics requested, including a significant amount of outdoor playtime for 12 children at a time within a lot of this size, are non-inherent adverse impacts of a group day care in the R-90 Zone.

However, these observations do not mean that the conditional use must be denied if the impacts may be mitigated. The Hearing Examiner finds that, with the limitations on the ages of



the children, the number of children that may be outside at any one time, and the time for commencing outdoor play will be sufficient to ensure that neighbors are not adversely affected.

Based on the entire record, the Hearing Examiner finds that, with the conditions imposed in Part IV of this Report and Decision, the proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effects alone or the combination of inherent and non-inherent adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

- 2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.*

Conclusion: This application proposes no changes to the existing structures on the property. Therefore, this requirement is inapplicable.

- 3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.*

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood with the conditions proposed.

#### **B. Development Standards of the Zone (Article 59.4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-90 Zone. Staff compared the minimum development standards of the R-90 Zone to those provided by the application in a Table included in the Staff Report (Exhibit 27, p. 12, on the following page).

**Table 1: Development Standards**

<b>Residential Zone (R-90)</b>	<b>Permitted/Required</b>	<b>Existing/Proposed</b>
<b>Lot and Density - 59.4.4.8.B</b>		
Min. Lot area (sf.)	9,000	9,916
Min. lot width at front bldg. line (ft.)	75'	75'+
Min. lot width at front lot line (ft.)	25'	25'+
Max. density (units/acre)	4.84	4.39
Max. lot coverage	30%	<30%
<b>Development Uses</b>	<b>Permitted/Required</b>	<b>Existing/Proposed</b>
Group Day Care 59.3.4.4.D	9-12 Persons	9-12 Persons
<b>Parking Req. - 59.6.2.4.B</b>	<b>Permitted/Required</b>	<b>Existing/Proposed</b>
Single-Unit Living	2.00	2.00
Non-resident employee (in addition to the residential spaces) - Group Day Care (9-12 Persons)	1.00 per non-resident employee	2.00 (on-street parking spaces area available on the adjacent streets)

**Conclusion:** As demonstrated in the table above, the proposed use meets all the development standards of the R-90 Zone.

**C. Use Standards for a Group Day Care Up to 12 Persons (Section 59.3.4.4.D.2.b)**

The specific use standards for approval of a Group Day Care for up to 12 children are set out in Section 59.3.4.4.D.2.b of the Zoning Ordinance. Standards applicable to this application are:

***2. Use Standards***

**b. Where a Group Day Care (9-12 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under all limited use standards and Section [7.3.1](#), Conditional Use.**

**Conclusion:** The necessary findings for all conditional uses are set forth in §59.7.3.1 of the Zoning Ordinance and are discussed above. The standards for a limited use are set out in §59.3.4.4.D.2.a of the Zoning Ordinance, below:

*a. The facility must not be located in a townhouse or duplex building type.*

Conclusion: This proposal is for a group day care in a single-family, detached house, and is therefore compliant.

*ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see Section [3.4.4.E](#)).*

Conclusion: Ms. Primm is both the provider and the resident of the dwelling. Therefore, this standard has been met.

*iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.*

Conclusion: The Applicant proposes no more than 2 full-time non-resident employees and one part-time non-resident employee. The Application meets this standard.

*e. In the AR zone this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: This standard does not apply because the property is located within the R-90 Zone.

In sum, the application satisfies all of the use standards in Code §59.3.4.4.D.2.

#### **D. General Development Standards (Article 59.6)**

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

##### **1. Site Access Standards**

The vehicular access to the subject site is an existing driveway from Woodcrest Drive.

Conclusion: Zoning Ordinance Division 59.6.1. governs site access. The requirements of this section do not apply to single-family detached zones, including the R-90 Zone involved in this

case.

## **2. Parking Spaces Required, Parking Setbacks and Parking Lot Screening**

The standards for the number of parking spaces required, parking setbacks and parking lot screening are governed by Division 6.2 of the Zoning Ordinance.

### ***a. Number of Parking Spaces Required by Section 59.6.2.4***

The applicable standards are referenced in the bottom half of the table on page 12 of the Staff Report (Exhibit 27):<sup>2</sup>

<b>Parking Req. - 59.6.2.4.B</b>	<b>Permitted/Required</b>	<b>Existing/Proposed</b>
Single-Unit Living	2.00	2.00
Non-resident employee (in addition to the residential spaces) - Group Day Care (9-12 Persons)	1.00 per non-resident employee	2.00 (on-street parking spaces area available on the adjacent streets)

As noted, the Staff Report was issued before Ms. Primm clarified that she wished to have a third non-resident part-time employee. The table demonstrates that four spaces are required without the part-time employee and Staff later advised that five spaces are required with the additional employee. Exhibit 41.

Conclusion: There are two parking spaces within the driveway, meeting the residential requirements. The Applicant submitted a graphic showing several on-street parking spaces and Staff advised that there are two on-street parking spaces on Woodcrest Drive and three on Bauer drive, more than meeting the required five spaces required for a group day care.

### ***b. Parking Design Standards***

Section 59.6.2.5.B, C and E contain several parking design standards applicable to the proposed use, as listed below.

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<sup>2</sup> The Applicant may count on-street parking space if they abut or confront the site. *Zoning Ordinance*, §59.6.2.3.A.5.



**B. Location**

***Each required parking space must be within ¼ mile of an entrance to the establishment served by such facilities.***

Conclusion: Staff reports that “each of the five on-street parking spaces is within ¼ mile of the primary entrance to the property.” Exhibit 27, p. 14. Having no evidence to the contrary, the Hearing Examiner concludes that this standard has been met.

**C. Access**

***Each parking space must have access to a street or alley open to use by the public. Vehicle access crossing primary pedestrian, bicycle, or transit routes must be limited wherever feasible.***

Conclusion: As shown on the plan showing the location of parking spaces, each of the on-street spaces have access either to Woodcrest Drive or Bauer Drive. The two on-site spaces have access to Woodcrest Drive. This standard has been met.

**E. Size of Spaces**

***1. Each parking space must satisfy the following minimum dimensional requirements:***

Parking Angle	Standard Space		Compact Space	
	Width	Length	Width	Length
Perpendicular	8.5'	18'	7.5'	16.5'
60 to 75 degrees	10'	23'	8.5'	21'
45 to 59 degrees	12'	26.5'	Not allowed	Not allowed
Parallel	7'	21'	6'	19.5'

Conclusion: Staff measured the on-site parking spaces (Exhibit 27, p. 14):

The existing driveway is 28'-8" long by 19'-0" wide; therefore it meets the minimum dimensional requirements for two cars. The proposed on-street parallel parking spaces are approximately 21' long by eight feet wide, and therefore comply with the Standard Space requirements for parallel parking spaces.

Based on this evidence, the Hearing Examiner concludes that this requirement has been met.

***c. Parking Setbacks, Screening and Landscaping***

Applicable parking lot setbacks and landscaping to screen the parking area are specified in two sections, Zoning Ordinance §59.6.2.9.B.

***B. Parking Lot Requirements for Conditional Uses Requiring 3 to 9 Spaces***

***1. If a property with a conditional use requiring 3 to 9 parking spaces is abutting Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use, the parking lot must have a perimeter planting area that:***

***a. satisfies the minimum specified parking setback under Article 59-4 or, if not specified, is a minimum of 8 feet wide;***

***b. contains a hedge, fence, or wall a minimum of 4 feet high; and***

***c. has a minimum of 1 understory or evergreen tree planted every 30 feet on center.***

***2. The Hearing Examiner may increase the perimeter planting requirements for a conditional use application under Section 7.3.1.***

Conclusion: Staff found these requirements inapplicable to the subject property because the employees and parents will park on adjacent streets; thus, no parking lot is required for the use. Exhibit 27, p. 15. Having no evidence to the contrary, the Hearing Examiner finds that this requirement is inapplicable to the proposed use.

**3. Site Landscaping, Screening and Lighting**

Standards for site landscaping and lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for screening are set forth in Division 6.5. The stated intent of Division 6.4 is “to preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. The stated intent of Division 6.5 is “to ensure appropriate screening between different building types and uses.” Zoning Ordinance

§59.6.5.1. These site screening and landscaping requirements are in addition to those that apply to screening and landscaping of parking facilities discussed above.

***a. Lighting***

The issue of lighting is easily disposed of because, by its own terms, Division 6.4 does not apply to existing lighting. Section 59.6.4.2. states:

*Division 6.4 applies to landscaping required under this Chapter, the installation of any new outdoor lighting fixture, and the replacement of any existing outdoor fixture. Replacement of a fixture means to change the fixture type or to change the mounting height or location of the fixture.* [Emphasis added.]

Conclusion: The Applicant does not propose any modifications to the lighting on the property. Exhibit 27, p. 15. Thus, the provisions of Division 6.4 regarding lighting do not apply to this case.

***b. Site Screening and Landscaping***

The issues of site landscaping and screening in the rear and side yards are more complicated than the lighting issues. The provisions of Division 6.4 are mostly general and definitional; however, the provisions of Division 6.5 are very specific. Zoning Ordinance §59.6.5.2.B. provides:

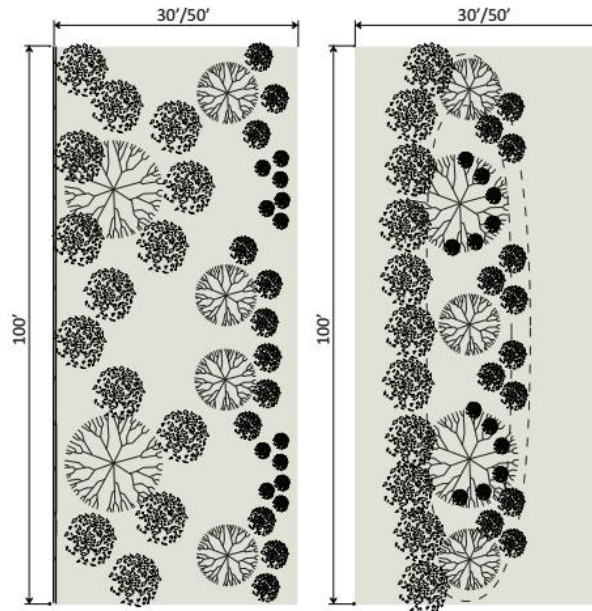
*In the Agricultural, Rural Residential, and Residential Detached zones, a conditional use in any building type must provide screening under Section 6.5.3 if the subject lot abuts property in an Agricultural, Rural Residential, or Residential Detached zone that is vacant or improved with an agricultural or residential use.*  
*1. The conditional use standards under Article 59-3 may exempt the development from this requirement.*  
*2. The Hearing Examiner may increase the amount of screening required for conditional use approval under Section 7.3.1.* [Emphasis added.]

Turning to the requirements of Section 6.5.3., referenced in the above-quoted section, the subject site is covered by Subsection 6.5.3.C.7., which provides:

*7. General Building with a Non-Industrial Use; Conditional Use in the Agricultural, Rural Residential, or Residential Detached Zones; and*

*Conditional Use in a Detached House or Duplex in Any Other Zone*

	Option A	Option B
<b>Dimensions (min)</b>		
Depth	8'	12'
<b>Planting and Screening Requirements</b>		
Trees (minimum per 100')		
Canopy	2	2
Understory or Evergreen	2	4
Shrubs (minimum per 100')		
Large	6	8
Medium	8	12
Small	8	--
Wall, Fence or Berm (min)	4' fence or wall	--



As is apparent, Section 6.5.3.C.7 gives two options, but within those options, the minimums are strictly prescribed by numbers and sizes of trees and shrubs. The Planning Board requested the Applicant and Staff to come up with a plan that would justify an alternative method of compliance with the Zoning Ordinance. Exhibit 28. The Applicant did submit a revised landscape plan, and Staff provided the following justification for an alternative means of compliance with the strict application of the screening requirements (Exhibit 36):

***Division 6.8. Alternative Compliance***

Section 6.8.1. Alternative Method of Compliance

*The applicable deciding body may approve an alternative method of compliance with any requirement of Division 6.1 through Division 6.6 if it determines there are unique site or development constraints, such as grade, visibility, an existing building or structure, an easement, a utility line, or use restrictions that preclude safe or efficient development under the requirements of the applicable Division and the alternative design will:*

*A. Satisfy the intent of the applicable Division;*

The Site adequately provides the intent of screening by providing a five to eight-foot board-to-board privacy fence along the abutting rear yard lot lines. The south rear yard area functions as a garden that participates in the Grow It Eat It Program with Montgomery County to teach the children where their food comes from and gardening's role in our daily lives. The minimum eight-foot width screening requirement along the south lot line will introduce unique site constraints that conflicts with the residence's gardening function, access, and circulation. A garden shed, garden beds, and gardening area is located along the south lot line. Any proposed landscape screening within the southern rear yard will prohibit the gardening function along the south lot line.

*B. Modify the applicable functional result or performance standards for the minimal amount necessary to accommodate the constraints;*

The Applicant is proposing native landscape screening along the east lot line to accomplish the screening requirements for the east lot line, per Section 6.5.3.C.7. While any landscape screening along the south lot line within the rear yard will prohibit the garden's function, the Applicant is proposing to plant a part of the front yard with native landscape screening. The proposed screening along with the existing mature trees and shrubs in the area will provide appropriate landscape screening, per Section 6.5.3.C.7. The existing trees on site provide adequate vertical screening and canopy. The critical root zones for each existing mature tree will be constrained by any additional canopy tree. The final location of the native planting in the front yard will be verified on site since the existing tree in the front yard is mature in age and the critical roots zone may prohibit some planting (Please refer the attached site photo for further information).

*C. Provide necessary mitigation alleviating any adverse impacts; and*

The Site's five to eight-foot board-to-board privacy fence meets and exceeds the required four-foot fence and still provides adequate screening along abutting lot lines.

*D. Be in the public interest.*

The alternative compliance is in the public interest because the garden serves local food to the community while educating the families associated with the Group Day Care services. Any native landscape screening will prohibit the education function and service the garden provides to the surrounding community.

Subsequent to Staff's recommendation, the County Council adopted revisions to the Zoning Ordinance in Zoning Text Amendment (ZTA) 15-09, effective December 21, 2015. The ZTA, which applies to this case, permits the Hearing Examiner to approve deviations from the minimum screening standards "to the extent the Hearing Examiner finds necessary to ensure compatibility." *Zoning Ordinance*, §59.7.3.1.E.1.b. Thus, it is no longer necessary to analyze non-compliance with the screening requirements under §59.6.8.1 of the Zoning Ordinance as an alternative means of compliance, provided the Hearing Examiner finds these deviations will not impact the compatibility of the use with the surrounding area.

The Hearing Examiner finds that the use is adequately screened from neighboring properties based on Staff's recommendations for an alternative means of compliance. All of the play areas are visually screened from adjacent properties by a 5-foot to 8-foot high privacy fence. The Applicant is providing a landscaping buffer along the east (rear) property line, which will include a mix of canopy trees and native understory trees and shrubs. As noted by Staff, existing mature trees located on the property will provide canopy and vertical screening. Requiring the mandatory screening buffers inside the existing privacy fence unduly restrict one of the learning activities on the site (i.e., the garden) and are unnecessary to screen visually activities of the proposed use. The Hearing Examiner finds that the proposed screening sufficient to ensure the compatibility of the use.

#### **4. Signage**

Signage for the use is governed by Division 6.7. Zoning Ordinance §59.6.7.8.A.1 sets



the standards for signs in Residential Zones:

**A. Base Sign Area**

*The maximum total area of all permanent signs on a lot or parcel in a Residential zone is 2 square feet, unless additional area is permitted under Division 6.7.*

**1. Freestanding Sign**

- a. One freestanding sign is allowed.*
- b. The minimum setback for a sign is 5 feet from the property line.*
- c. The maximum height of the sign is 5 feet.*
- d. Illumination is prohibited.*

Conclusion: Despite the limitation to one freestanding sign, above, Staff found that signage on the property complied with the sign requirements because (Exhibit 27, p. 16):

Two signs are currently located along the abutting streets. One sign faces Woodcrest Drive and the other faces Bauer Drive. The existing signs is [sic] two-square-foot each, or less, in area. The Application does not propose any new signage.

The Hearing Examiner finds that the language of the Zoning Ordinance clearly limits the Applicant to one free-standing sign advertising the day care. Nevertheless, the Hearing Examiner may apply the standards to the extent she finds it “necessary to ensure compatibility” of the use with the surrounding area. The Hearing Examiner finds that the two existing signs will not adversely affect the surrounding area because they have existed for some time without complaint from the neighbors and they are quite small in size. In addition, because this is a corner lot, the signs aid in finding the use from both approaches, thus ensuring safe vehicular traffic surrounding the site.

**IV. Conclusion and Decision**

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of James Moy and Ambor Primm, d/b/a A Mum's Touch Day Care (CU 16-03), for a conditional use under Section 59.3.4.4.D. of the Zoning Ordinance, to operate a group day care for up to 12 children at 14227 Woodcrest Drive, Rockville, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses identified in this Report and Decision.
2. The proposed group day care must be limited to 12 children, ranging in age from 6 weeks to 5 years, except that the Applicant's own children may be up to 12 years of age.
3. The hours of operation must be limited to 7:30 a.m. until 5:30 p.m., Monday through Friday. No weekend or overnight day care is permitted.
4. The Applicant may employ up to 2 full-time non-resident staff members and one part-time non-resident staff member, in addition to herself. Non-resident staff members must not report to the site before 7:30 a.m. and leave no later than 5:30 p.m.
5. All physical improvements to the property are limited to those shown on the site plan (Exhibit 6) and the Landscape Plan (Exhibit 34(a)).
6. Employees for the child day care facility must park off-site on nearby streets where on-street parking is allowed.
7. All children must be under the direct supervision of a staff member at all times. No more than 8 children shall be permitted to play outdoors at any one time, except for two structured learning activities in the morning and two in the afternoon. Structured learning activities may not exceed 20 minutes in length. Outdoor play times must not start before 8:30 AM.
8. The Applicant shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
9. Vehicular arrival and departure times for the children must be staggered, through contractual agreements between the Applicant and the parents, so that no more than two vehicles visit the site within any 15-minute period to drop off or pick up children.
10. All gates or other access to the outside play area must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.

11. The Applicant must comply with and satisfy all applicable State and County requirements for operating a group day care, and correct any deficiencies found in any government inspection.
12. The Applicant shall maintain the grounds in a clean condition, free from debris, on a daily basis.
13. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 4<sup>th</sup> day of January, 2016.



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Lynn A. Robeson  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

#### COPIES TO:

Ambor Primm and James Moy, Applicants

Barbara Jay, Executive Director  
Montgomery County Board of Appeals  
Michael Bello, Planning Department